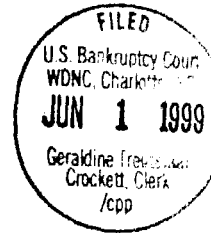


UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:) Case No. 99-30103
MICHAEL TIMOTHY TURNER,) Chapter 7
Debtor.)



ORDER

JUDGEMENT ENTERED ON JUN 0 1 1999

This matter came before the Court on May 13, 1999 upon Motion and Amended Motion for Relief from the Automatic Stay filed by Margot Derenge ("Derenge") and Response thereto filed by the Debtor. The material facts are not in dispute.

Derenge is the former spouse of the Debtor. On January 19, 1999, the Debtor filed a Chapter 7 bankruptcy case with this Court. At the time, an equitable distribution action was pending in North Carolina State District Court for Union County. File No.99 CVD 242.

The Debtor scheduled Derenge as a creditor in his bankruptcy case, listing her as having a marital debt in the amount of \$35,519.11. On January 14, 1999, a Notice of the First Meeting of Creditors was entered by the Clerk and served upon creditors. That Notice gave creditors, including Derenge, notice of the bankruptcy case, and of the bar date for filing complaints objecting to the Debtor's discharge or dischargeability of a particular debt in accord with 11 USC 523. In this case that deadline was April 26, 1999.

Derenge received notice of the bankruptcy, but did not object to dischargeability of debt within the statutory period. Instead, on April 5, 1999, Derenge filed a motion seeking relief from the bankruptcy stay (11 U.S.C. 362) so that she could return to state court and proceed with her equitable distribution case. An Amended Motion was filed on April 8, 1999. Derenge noticed the motion for hearing on April 29, 1999. A Response was filed by the Debtor on April 20, 1999, prompting the Movant to renote the hearing for May 13, 1999.

Derenge contends that she is not a creditor of the debtor. Rather she contends that by virtue of her equitable distribution claims, she has vested marital property rights against the debtor as by NCGS 50-20(k). She wishes to have these rights determined by the state court. She seeks property, a monetary recovery of the debtor and a judicial determination that the Debtor must pay marital debts owed to third parties. Some of these debts were included in the Debtor's bankruptcy and have been discharged. Derenge also contends her equitable distribution claims are not dischargeable.

The Debtor says that Ms. Derenge has possession of all of their marital property (no evidence was presented by either party). He disclaims any interest in any property in her possession. On the other hand, the Debtor contends that Derenge's equitable distribution claims against him were debts discharged by his bankruptcy discharge.

CONCLUSIONS OF LAW

This dispute turns upon the nature and treatment in bankruptcy of equitable distribution claims created under North Carolina state law, NCGS 50-20(k). Equitable distribution claims are domestic property settlement obligations.

Although Derenge argues otherwise, it is well established in North Carolina that equitable distribution claims are not property interests and do not place title to marital property in the nonfiling spouse. Iyerly v. Internal Revenue Service, No.5:96 CV36 (W.D.N.C., Sept. 8, 1998); In re Halverson, 151 BR 358, 362 M.D.N.C. 1993 (and Perlow v. Perlow, 128 BR 412, E.D.N.C., 1991). Rather, these cases hold that such rights are only unsecured claims in a bankruptcy case.

This result is mandated by the wording of the Bankruptcy Code. A "debt" is defined as "liability on a claim." 11 U.S.C. 101(12). A "claim" is no more than a right to a payment or to an equitable remedy. 11 U.S.C. 101(5). Even a property right can be a claim. The Supreme Court has held that an *in rem* interest like a home mortgage is a claim for bankruptcy purposes, even where the borrower's personal liability on that debt has been discharged by a prior bankruptcy. Johnson v. Home State Bank, 111 S.Ct. 2150 (1991). Therefore, Derenge is incorrect in her contention that she is not a creditor and that her property settlement claims are not a debt.

The question then becomes whether these domestic obligations survived Michael Turner's bankruptcy filing. Here it is necessary

to distinguish between property settlement debts on the one hand and alimony and child support debts on the other.

Under Code Section 523(a)(5), debts in the nature of alimony, maintenance and child support are not dischargeable and survive a bankruptcy. 11 U.S.C. § 523(a)(5). As to these, both the bankruptcy court and the state court have concurrent jurisdiction. Goss v. Goss, 722 F.2d 599, 602 (10th Cir, 1983). The determination of dischargeability may be brought in either court, while the bankruptcy case is pending or after it is over. 11 U.S.C. 523(a); FRBP 4007(c). In fact, the federal appellate courts have shown a preference that domestic matters be handled in the state forum. In re Robbins, 964 F.2d 342 (4th Cir. 1992).

However, that applies only to debts that are actually in the nature of alimony, maintenance and support ("AMS debts"). In contrast to AMS debts, until recently property settlement debts were entirely dischargeable in bankruptcy. In 1994, Congress added an additional exception to the debtor's discharge for non AMS marital obligations in Section § 523 (a)(15). The law now excepts from the discharge any debt which is:

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit unless --

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary

for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

In short, property settlement obligations may not be discharged, but only if the equities favor the debtor over the creditor spouse or dependant.

Although it was intended to strengthen the rights of spouse and dependents, the new law has a couple of exceptions that create traps for the unwary. First, in contrast to AMS debts, the dischargeability determination must be sought within sixty (60) days of the first date set for the first meeting of creditors. 11 U.S.C. 523(c)(1). Second, this determination cannot be brought in state court--it must be filed in Bankruptcy Court. Id.

The failure to pursue the matter in this way is fatal. Failure to file such an action within that time period bars the claim and the same is discharged.

Due to the new law, this Court is unable to send this matter back to state court as Derenge requests. Before such a suit could be pursued in state court, this Court must determine whether the debt was discharged under Section 523(a)(15). This may in turn require a determination on the merits, as one can hardly evaluate the burden of carrying a debt without knowing its amount and duration.

This is regrettable. The operation of the statute is messy and has had the affect of causing many state domestic actions to be

brought to federal court. It also forces the nonfiling spouse to make a hurried legal judgment as to the nature of the parties' separation agreement/order and to bear the financial costs of filing an adversary proceeding. In spite of the doctrine that holds that domestic litigation belongs in state court, practically, the new statute forces more domestic litigation into Bankruptcy court. However, this Court must apply the statute as it is written.

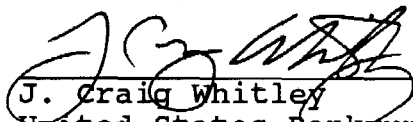
In the current case, Derenge did not file a complaint objecting to dischargeability. At hearing, the undersigned indicated that the debt was discharged and could not be litigated. Having considered the matter further, the Court believes that this would needlessly elevate form over substance. Derenge did not sleep on her rights but simply asked for the incorrect relief--relief from stay and not a denial of dischargeability. She did so based on a Circuit Court opinion (Robbins) issued before the new law became effective. Her motion was filed within sixty (60) days of the first meeting date, and it alleged that the equitable distribution obligations were nondischargeable.

Therefore, as a court of equity, under Code Section 105, and in order to avoid an unjust result, the undersigned will treat the Motion as a Complaint objecting to Dischargeability under Section 523(a)(15) and allow the Plaintiff twenty (20) days from entry of this order to amend the same to plead the cause of action properly; to pay the filing fee; and to obtain issuance of a summons. If not done, after twenty days this Order will become a final adjudication

that these obligations are discharged, and the motion will be denied.

SO ORDERED.

This the 28th day of May, 1999.



J. Craig Whitley
United States Bankruptcy Judge